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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 43896 - 8 - II

THE COURT OF APPEALS DIVISION II

STATE OF WASHINGTON,

Respondent.

V.

KEITH HORNADAY,

Appellant.

THE HONORABLE JUDGE LEILA MILLS

STATEMENT OF ADDITIONAL GROUNDS

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P/m 9/15/13

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A. ASSIGNMENT OF ERROR

1. Prosecutorial misconduct during closing arguments were improper and prejudicial.
2. In the alternative prosecutor misrepresented impermissible evidence under ER 403 and 404 (B).
3. Insufficient evidence to support Assault Second Degree conviction.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Was the prosecutors comments in closing arguments improper and prejudicial in the context of the entire argument?
2. Was the evidence misrepresented by prosecutor, impermissible under ER 403 and 404 (b) ?
3. Can the evidence be characterized as sufficient to support the Assault Second Degree conviction?

B. STATEMENT OF THE CASE.

The state charged Keith Hornaday with Second Degree Assault - Domestic Violence - Two counts of Witness Tampering & Six counts of Felony Violation of a No-Contact Order based on allegations that he assaulted Yvonne Klepper & then repeatedly contacted her via phone & letter. [VRb 64-73(1-10)]

Yvonne testified that she is Keith Hornaday's wife [VRb 178(19), 179(2), 182(16-18)]. Also she preferred to be called Mrs. Hornaday. [VRb 222(15-17)] On the evening of October 30, 2011. Mr. Hornaday got into an argument inside the house where they were staying. [VRb 183(8-11)] Mrs. Hornaday testified that the argument manifested into a fist fight [VRb 184(23-24)] & Mrs. Hornaday stated that she punched Mr. Hornaday first, in the face. [VRb 197(11-14)] Also Mrs. Hornaday had blood on her inside the house. [VRb 485(16-17)]

Yvonne's brother, Chris Smith, testified that he lives upstairs from the house & heard the fight inside the house [VRb 429(11-16)] Smith testified that after the fight inside the house, his sister, (Yvonne) goes to his apartment to use his phone to call Mr. Hornaday. Mr. Hornaday returns in the alley and that's where Mr. & Mrs. Hornaday argued again. [VRb 430(12-23)] Smith testified that Mr. & Mrs. Hornaday argued briefly in the alley & Mr. Hornaday leaves [VRb 431(3-4)] Yvonne returns to Smith's apartment to call Mr. Hornaday on the phone again.

[VRb 431(13-14)] Smith stated Mrs. Hornaday left his apartment around 10:30 P.M. with Erik McSheperd, [VRb431(18-24)] where Yvonne returns to Smith's Apartment with Erik McSheperd around 1:00 A.M. again to use Smiths phone to call for a ride to the hospital. [VRb 432(13-25)]

Mrs. Hornaday testified that she doesn't remember much about the attacker. When asked whether Keith Hornaday attacked you? Yvonne testified, "I remember him in the alley, but I don't remember if it was exactly him in the alley." [VRB 184(25)],185(1-2)] Yvonne later testified that she did see Mr. Hornaday, but doesn't indicate where in the alley. [VRb 293(5-14)] Mrs. Hornaday testified that she was walking alone in the alley on the way to the store, when she see's Mr. Hornaday & at that moment she is attacked from behind. [VRb 198(8-19)]

Ms. Mason, a triage nurse, working in the front desk & whose job requirement is to take down information. [VRb 400(10-140)] testified that Yvonne checked into the hospital at 1:56 A.M. with Mr. McSheperd. Ms. Mason also testified that Yvonne reported to have been assaulted walking down an alley by her ex-boyfriends. [VRb 401(12-14)]

Dr. Perry, the Physician that treated Mrs. Hornaday, testified that Yvonne had some bruises on her face, knee & neck, but no damage to her windpipe, a common strangulation injury.

[VRb 304-306] Dr. Perry testified that Mrs. Hornaday reported to have been attacked from behind by an ex-boyfriend while getting out of a car [VRb 299(13-14)] going home. [VRb 308(1-2)]

Officer Bryan Hall was dispatched to the hospital & took pictures of Mrs. Hornaday's injuries.

The jury found Hornaday guilty of all charges, but indicated by special verdict that if it could not agree as to the strangulation alternative of Second Degree Assault.

The court sentenced Hornaday to an exceptional sentence of 73 months of confinement & 18 months of community custody on the Assault charge. The court ordered the Witness Tampering count 2 to run concurrent with the 73 months of count one. The court order the remaining counts it would be 60 months consecutive, for a total of 133 months.

Hornaday timely appeal.

C. ARGUMENT

1. THE PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS WERE IMPROPER & PREJUDICIAL.

The prosecutor committed misconduct in the closing arguments with improper comments in the context of the entire argument, by misrepresenting the facts in the record.

Reversal of assault conviction is also required because jury instructions given to the jury by the trial court, if not objected to, shall be treated as applicable law & any comments to the contrary is improper & violates the 14th Amendment.

Under RAP 2.5 (a) Allows appellant to obtain review of a claim raised for the first time on appeal, where the claim involve a manifest error affecting a constitutional right. This exception allows an appellant to obtain review of a claim raised for the first time on appeal, where the error is both manifest & constitutional magnitude [O'HARA, 167 Wn.2d at 98] citing [KIRKMAN, 159 Wn.2d 926(2007)]

The "Manifest" error prong of RAP 2.5 (a) requires an appellant to show at a minimum that the error is obvious on the record in light controlling authority. This definition is consistant with Supreme Court recent Indication that the core inquiry under the manifest error prong of RAP 2.5 (a) is where the error is obvious on the record. [GORDON, 172 Wn.2d 671, 676(2013)][O'HARA, 167 Wn.2d 91, 99-100(2009)] This definition also flows naturally from the plain meaning of the term "Manifest Error": A error that is plain & indisputable, that amounts to a complete disregard of the controlling law or the credible evidence on the record. [BLACKS LAW DICTIONARY 622 9th Ed. (2009)]

This case implicates the fundamental criteria by which appellant courts in Washington grant review of unpreserved constitutional error. Under ER 403 prohibits arguing evidence of

a prior bad act on grounds of prejudice, confusion or misleading the jury. The trial court records sufficiently shows that the prosecutors misconduct at Mr. Hornaday's trial was highly prejudicial & no jury instruction can obviate the resulting prejudicial effect it had in this case.

The record contains evidence of an incident that occurred in the house. Mrs. Hornaday testified this incident inside the house was a fist fight involving her & Mr. Hornaday. [VRb 183(8-10)][VRb 184(23-24)][VRb197(11-14)] However the state is not seeking to charge Mr. Hornaday with this incident inside of the house, as indicated in jury instruction #15. The record contains reference of both parties spending substantial time reviewing the instructions. The state did not object to the substance of jury instruction #15, also informed the jury to the instruction. [VRb 476(12-22)] Under the law of the case doctrine, instructions given to the jury by the trial court, if not objected to, shall be treated as the applicable law. The law requires strict compliance, which not only ensures right to due process, but also preserves the integrity of the judicial process. [HICKMAN, 135 Wn.2d 97(1998)] The state's improperly commented to the contrary of jury instruction #15 was prejudicial & violated ER 403, the use of that prior incident inside the house, or any misleading inference from that uncharged prior act inside the house, violated Mr. Hornaday's constitutional right to due process under 14th Amendment.

While a prosecutor has some latitude to argue facts & inference from the evidence, " A prosecutor is not permitted to make prejudicial statements unsupported by the record." [RÁMOS, 164 Wn.App. at 341(2011)];[JONES, 144 Wn.App. 284,293(2008)][MILLER V. PATE, 386 U.S. 1, 6-7 87 S.Ct 785, 17 L.Ed 690(1967)] Holding that prosecutors commits misconduct by misrepresenting the facts in the record. Prejudice is established where, there is a substantial likelihood the instance of misconduct affected the jury's verdict. [JONES, 144 Wn.App. at 290]

A claim of harmless error should be closely examined where it resulted from the deliberate effort of the prosecution to get improper evidence before the jury. [Aaron, 57 Wn.App. 277, 282(1990)]

In the case, the record contains reference of both parties spending substantial time arguing the exhibits, the state argued relevance to prove violation of no-contact order, also tampering with witness [VRb 8(6-12)] Trial court permitted the phone calls & their contents into evidence. None the less in closing arguments the prosecutors mindful flagrant comment that Mr. Hornaday's no denial of the contents of a jail phone call that occurred on January 18th, 2012. As significant when considering whether Mr.Hornaday committed assault 2 degree [VRb 485(-17)]

Although the specific content of the conversation of Mrs. Hornaday's comment depicting blood from incident &

ex-roommate connection to incident inside the house. Jury instruction #15 protects Mr. Hornaday from all charges & allegations relating to incident inside the house. Thus relieving Mr. Hornaday from conceding nor denying any allegations of incident inside the house. The record contains no reference that supports the prosecutors misleading argument. Mrs. Hornaday's testimony at trial did not establish for the jury a piece of evidence to connect the ex-roommate to the charged incident in the alley.

The prohibition of arguing unsupported evidence, that contravene the jury instruction is improper & the law requires strict compliance which not only ensures constitutional right to due process, but also preserve the integrity of the judicial process. [HICKMAN, 135 Wn.2d 97(1998)] This misconduct violated Mr. Hornaday's right to due process 14th Amendment.

Where prosecutorial misconduct infringed a constitutional right prejudice is presumed. [TOTH, 162 Wn.2d 610, 615(2009)] To overcome the presumption of prejudice the state must establish beyond a reasonable doubt that the error was trivial, formal, or mere academic, that it did not prejudice the accused & that in no way was affected the final outcome of the case. [CITY OF BELLVUE V. LORING, 140 Wn. 19, 32(2000)] The misconduct is of constitutional magnitude, because the error infringed Mr. Hornaday's 14th Amendment right to due process & right to protection under the law. As jury instruction #15 establish the very nexus of the issue that is protected by law in this case. "state not seeking

to charge Mr. Hornaday for "INCIDENT" in house."

The record contains evidence of the prosecutor's misconduct of misleading the jury. [VRb 486(11-17)]

Such misconduct is a "Serious irregularity having the potential to mislead the jury. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict" [DAVENPORT, 100 Wn.2d 757, 760(1984)]

The error may be raised for the first time on review because the prosecutor's misconduct was so pervasive as to create a manifest error affecting Mr. Hornaday's constitutional right to due process & equal protection under the law RAP 2.5(a) Additionally the argument was so flagrant & ill-intended that the objection was unnecessary & curative jury instruction #15 only highlighted the offending misconduct. As many courts have noted, "A bell once rung cannot be unring." [EASTER, 130 Wn.2d 228, 230 39(1996)]

The prosecutorial misconduct robbed Mr. Hornaday of his right to a jury verdict free from improper influence [HORTON, 116 Wn.App. 909, 921(2002)] It violated Mr. Hornaday's equal protection & due process rights. For these reasons his conviction must be reversed & a new trial granted.

2. IN THE ALTERNATIVE PROSECUTOR MISREPRESENTED
IMPERMISSIBLE EVIDENCE UNDER ER 403 AND 404 (B).

Prosecutorial misconduct by misrepresenting evidence unsupported by the record. To maintain uniformity of United States Supreme Court decision and secure conformity to United States Supreme Court authority, Mr. Hornaday respectfully requests this Honorable Court to consider whether his state trial violated the constitution, law or treaties of the United States. 28 U.S.C. §2241.

Prosecuting attorneys are Quasi-Judicial Officers who have a duty to ensure that "Defendants" receive a fair trial. Prosecutorial misconduct violates this duty and can constitute reversible error. [STATE V. BOEHNING, 127 Wn.App. 511, 518(2008)] Accordingly under criminal law [110K 1134.16 Arguments & Conduct of Counsel]; Appellant Court review allegedly improper statements by the state in the context of the argument as a whole, the issue involved in this case, the evidence referenced in the statement and the jury instructions. [ANDERSON, 153 Wn.App. 417(2009)]

Evidentiary error that are non-constitutional require reversal when within reason probabilities, the error materially affected the outcome of the trial. [STATE V. BEADLE, 173 Wn.2d 97(2012)][STATE V. BRIEJER, 172 Wn.App. 209, 225(2012)] Only relevant evidence is admissible at trial. Evidence that is likely

to stimulate an emotional response rather a rational decision, creates a danger of unfair prejudice. ER 403 [BEADLE, 173 Wn.2d at 121; Brieter, 172 Wn.App. at 225-226; STATE V. GRIER, 168 Wn.App. 635(2012)] This court reverse held that the evidence was unfairly prejudicial and an abuse of discretion under [ER 401, 402, 403] as well as under [ER 404(b).] Had the trial court conducted an [ER 403] balancing it likely would have concluded that the evidence was unfairly prejudicial.

Enforced rules and broad mandates (I.E. jury instructions) selectively enforce matters of legal judgement that deters from a consistent application of the law.

The term "Law of the case" means different things in different circumstances. In one sense, it refers to the doctrine holding that a decision rendered in a former appeal of a case is binding in a later appeal. (2) An earlier decision giving rise to the application of this doctrine [BLACKS LAW DICTIONARY 8th Ed.] This term referring to the "Rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law."

In this case, Mr. Hornaday is relying on the term, which requires jury instructions. Court records contain evidence, at trial showed reference of both parties spending substantial time reviewing the instructions and trial court believed that jury instruction #15 applied to this case.

Accordingly the prosecutor instructed the jury as follows:

"Now you've been given another instruction, jury instruction #15. And it talks about the fact that the state is relying upon evidence regarding a single incident. And the reason why that jury instruction is given because, in this case, you heard from the victim that we had an incident that occurred within the house. And sometime later, we had an incident that occurred in the alley-way. For the charge of Assault Second Degree, the state is only relying on the incident in the alley-way. And so that's what that instruction is for."
[CP 476 (12-22)]

The prosecutor did not object to this instruction. Thus, the instruction become the law of the case. [STATE V. HICKMAN, 135 Wn.2d 97(1998)] The law requires strict compliance, which not only ensures right to due process, but also preserves the integrity of the judicial process. Therefore the issue is whether or not the state violated Mr. Hornaday's constitutional protected 14th Amendment.

In this case, that state instructed the jury, "The fact that that state is relying upon "evidence" regarding a "single incident." "Mr. Hornaday contends the "Evidence" presented (I.E. photo's & medical report) can not be characterized as "Evidence

in consideration of a single incident." rather this evidence presented to the trier of facts, is tainted from the other incident as well. The prosecutor misrepresented this fact, the record contains reference to support Mr. Hornaday's claim of contaminated evidence from incident inside the house as a fist fight involving Mr. Hornaday and Mrs. Hornaday(I.E. victim) [CP 183(8-11)] [184(23-24)] [197(11-14)]

Mr. Hornaday contends the prosecutor violated his due process by flagrantly misrepresenting evidence that was tainted with injuries from prior uncharged incident inside the house, evidence of prior misconduct inadmissible under 404(b) [STATE V. FRAZIER, 55 Wn.App. 204, 212(1989)][STATE V. BOURGEOIS, 133 Wn.2d 389, 405-06(1997)] See [STATE V. BROWN, 159 Wn.App. 1, (2010)] Court of Appeals concluded trial court erred in admitting this evidence.

The prosecutor expressed her own personal opinion, that the evidence of injuries presented at Mr. Hornaday's trial is regarding a single incident, this highly prejudicial statement is unsupported by the record when no distinction from injuries that occurred inside the house in uncharged prior incident and the incident in the alley-way.

Prejudice is established the instance the likelihood a rational trier of fact was misled and swayed to form a finding of guilt, based upon tainted evidence of prior incident. Where prosecutorial misconduct infringes a constitutional right,

prejudice is presumed [STATE V. TOTH, 155 Wn.2d 610, 615(2009)]

While prosecutor has some latitude to argue facts and inferences from the evidence, "A prosecutor is not permitted to make prejudicial statements unsupported by the record. [STATE V. RAMOS, Wn.App at 341(2011)]; [STATE V. JONES, Wn.App. 284, 293(2008)] [MILLER V. PATE, 386 U.S. 1. 6-7 87 S.Ct 785, 17 L.Ed.2d 690(1967)] Holding that prosecutors commit misconduct by misrepresenting the facts in the record.

This flagrant misconduct was highly prejudicial and misleading to the jury, thus it robbed Mr. Hornaday of his due process. Thus Mr. Hornaday Assault conviction must be reversed and a new trial granted.

3. INSUFFICIENT EVIDENCE TO SUPPORT ASSAULT SECOND DEGREE CONVICTION.

A challenge to the sufficiency of the evidence requires this court to review whether, after viewing the evidence in a light most favorable to the state, any rational trier of the facts could have found the essential elements of the crime beyond a reasonable doubt. [GREEN, 94 Wn.2d 216, 221(1980)] The untainted evidence is so overwhelming it necessarily leads to a find of guilt. [BURKE, 163 Wn.2d 204, 222(2008)] A conviction based on insufficient evidence contravenes the due process clause of the 14th Amendment & thus results in unlawful restraint. [JACKSON V. VIRGINIA, 443, U.S. 307, 316 99 S.Ct. 2781 61 L.Ed.2d 560(1979)]

In this case, the record contains reference that the perpetrator in the alley as an "ex-boyfriend." [VRb 401(12-14)] The record contains no evidence that reference Mr. Hornaday's status as ex-boyfriend. Yvonne testified that she is Mr. Hornaday's wife [VRb 178 (19), 179(2) 182(16-18)] Also she preferred to be called Mrs. Hornaday [VRb 222(15-17)] at trial. Therefore it is otherwise unreasonable to infer that, "ex-boyfriend" referenced Mr. Hornaday. A rational trier of fact could not identify Mr. Hornaday as "ex-boyfriend" based on the strength of the evidence. [SHARKEY, 289 P.3d Wn.App. (2012)]

This case is unlike [SAKELLIS, 164 Wn.App. (2011)] & [SMITH, 106 Wn.2d 772(1986)] Where evidence as to identification of defendant as the perpetrator, together with equivocal testimony by the victim & witness constituted sufficient evidence.

Here the record contains no evidence that characterized Mr. Hornaday as "ex-boyfriend" nor any testimony by victim or witness. The evidence cannot be considered sufficient to support conviction for Assault. Mrs. Hornaday testified & never stated Mr. Hornaday assaulted her. [VRb 231(1-5)] Chris Smith, the victims brother, testified also & his testimony does not support Mr. Hornaday assaulted Mrs. Hornaday in the alley. [VRb 430(17-25), 432(3-25)]

Mrs. Hornaday's testimony is ambiguous in reference to Mr. Hornaday's presence when Mrs. Hornaday was attacked in the alley. [Vrb 184(25), 185(1-5), 231(17-19), 293(5-14)] When viewing the evidence in the light most favorable to the state, Mr. Hornaday's mere presence does not constitute sufficient evidence to characterize Mr. Hornaday as perpetrator of the assault.

The accused mere presence at the scene of a crime, if even coupled with assent to it, in the record is insufficient to prove complicity. The state must prove the defendant was ready to assist in the crime. [LUNA, 71 Wn.App. 755, 759(1993)] Here, the state showed only Mr. Hornaday's presence in the alley.

In the challenge to sufficiency the defendant admits the truth of the state's evidence & all reasonable inference that can be drawn from it. [COLQUITT, 133 Wn.App. 789(2006)]

As for the incident in the alley, Mrs. Hornaday testified that she was assaulted from behind in the alley. [VRb 198(8-10)] On redirect Mrs. Hornaday testified that she had seen Mr. Hornaday at the moment she was attacked [VRb 293(5-14)] from behind. The evidence contained in the record is insufficient to indicate the distance that separated Mr. & Mrs. Hornaday at the moment she saw him, when she was attacked. The record contains no evidence that indicates whether Mrs. Hornaday seen her husband within 30 inches, 30 feet or 30 yards from her in the alley at the moment she is being attacked from behind by an "ex-boyfriend."

Thus the state did not prove Mr. Hornaday's status as the ex boyfriend. There was no evidence before the jury indicating the distance separating Mr. Hornaday from Mrs. Hornaday in the alley. The state failed to establish a nexus to complete the crime story at the critical moment of the assault in the alley. The evidence, at best, places Mr. Hornaday in the vicinity near the alley somewhere Mrs. Hornaday could see him when she was attacked from behind.

For these reasons Mr. Hornaday's conviction must be reversed & vacated.